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IN THE

Supreme Court of the United States

October Term, 1944.

No. 657

SEGAL LOCK & HARDWARE COMPANY, INC., NORWALK LOCK COMPANY, and LOUIS SEGAL,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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INDEX.

	PAGE
Jurisdiction	1
Opinion Below	1
The Facts	2
Statute Involved	6
Questions Presented	6
Assignment of Errors	8
Reasons for Granting the Writ	8
Affidavit of Louis Segal	8
Brief in Support of Petition	12
Certificate of Counsel	23
Appendix	24

CASES CITED.

Alford v. United States, 282 U. S. 687 ..... 12, 16, 17

Benton Announcements v. Federal Trade Commission, 130 F. (2d) 254 14

Blitz v. United States, 153 U. S. 308, 312 18

Clark v. Federal Trade Commission, 128 F. (2nd) 542 ..... 16, 17

Du Pont de Nemours Powder Co. v. Masland, 244 U. S. 100 15

PAGE

Farkas v. United States, 2 F. 2nd) 644 16
Federal Trade Commission v. Standard Educational Society, 302 U. S. 112 14
Furlong v. United States, 10 F. (2nd) 492 16

Interstate Commerce Commission v. Louisville and Nashville R. R. Co., 227 U. S. 88 ..... 13, 20

J. B. Lippincott Co. v. Federal Trade Commission, 137 F. (2nd) 490, 491 14

The Ottawa v. Stewart, 70 U. S. 268 ..... 16, 21

Rea v. Missouri, 17 Wall. 532, 542-543 18

Segal Lock & Hardware Company Inc., et al. v. Federal Trade Commission, 143 F. (2nd) 935 1
Storm v. United States, 94 U. S. 76, 85 18

Tla-Koo-Yel-Yee v. United States, 167 U. S. 274 .. 16

STATUTES CITED.

Judicial Code, Section 240 (a) 1
Federal Trade Commission Act, Section 5(a) 6, 24
15 USCA Section 45(c) 14

MISCELLANEOUS.

Wigmore Evidence, 3rd Ed., Vol. 8 (§22212) 16
Jones, Commentary on the Law of Evidence (2nd Ed.) Vol. 5, Section 2345 21

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OCTOBER TERM, 1944.

SEGAL LOCK & HARDWARE COMPANY, INC., NORWALK LOCK COMPANY, and LOUIS SEGAL, *Petitioners*, v. FEDERAL TRADE COMMISSION, *Respondent.*	No. .....

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The petitioners, Segal Lock & Hardware Company, Inc., Norwalk Lock Company, and Louis Segal, pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals entered in the above case on August 8, 1944, affirming an order of the Federal Trade Commission.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported 143 (F 2d) 935 and is printed R. 742-745.

The Facts.

The petitioners are the Segal Lock & Hardware Company Inc., a New York corporation, and its subsidiary the Norwalk Lock Company, a Connecticut corporation. Also one of the petitioners herein is Louis Segal, the president and treasurer of both corporations which are engaged in the manufacture and sale in interstate commerce of locks and lock cylinders, marketed under the trade name "Segal-Pick-Proof" and formerly advertised by slogans as, "the only cylinder that is impossible to pick", "only your key will unlock it" and similar statements respectively and that petitioners' lock affords absolute security against *picking** and is the only lock which does so. Except for the expression "Segal Pickproof" the slogans referred to have long been discarded and are no longer used by the petitioners.

On September 16, 1939 the Federal Trade Commission issued its complaint against the petitioners, alleging that the representations above referred to constitute a violation of Section 5 (a) of the Federal Trade Commission Act, as amended, 15 USCA Section 45 and alleging that petitioners are guilty of unfair methods of competition under this Section.

Hearings were had before the Federal Trade Commission and on June 12, 1942 the Commission ordered that the petitioners cease and desist from using the term "pickproof" in connection with their locks or otherwise representing that their locks or lock cylinders *cannot be picked*.

During the hearings to prove its charge alleged in the bill of complaint that the Segal pickproof cylinder is not pickproof, the Federal Trade Commission called three witnesses, Robert E. Rusch, James E. Leurele, and Charles Courtney. Each testified, on behalf of the Commission, on direct examination to have successfully picked the Segal "pickproof" cylinder. Each however on cross-ex-

*Throughout petition italics ours.

amination refused to test his ability in regard to successfully picking the Segal "pickproof" cylinder by a public demonstration in open court and further refused to disclose the picking methods and picking instruments employed for such purpose. Rusch and Leurele relied on the privilege of trade secret. The Federal Trade Commission's attorney, Mr. Baughman, directed Rusch not to make the test (R. 302, fol. 905) in the presence of petitioners:

Mr. Baughman:

> "Just a minute I am going to say something here—forcing on him (Rusch)* the burden of showing him as being a witness that is not willing to cooperate and testify on what you are trying to get from him which is a secret which he should not be forced to divulge without being compensated and the Commission has taken the position up until now that it will not pay for doing that."

Mr. Palmer:

> "I gather this witness will not make a public demonstration."

Mr. Baughman:

> "He will not and I have so told you."

Leurele, also called on behalf of the Commission, likewise *refused* to make a public demonstration on instructions by government counsel, Mr. Baughman, as to picking or to divulge his picking method or instruments (R. 354, 355, fols. 1062-1065) in that he might disclose a trade secret. Asked on cross-examination to demonstrate his ability to open the Segal "pickproof" cylinder with any type of picking means, Leurele answered (R. 355, fol. 1065):

*Parenthetical inclusion added.

A. "No, I will not."

Q. "You refuse to do that, is that right? Yes or no."

Trial Examiner:

"He has refused, yes."

Every effort* to test the credibility of the witnesses Rusch and Leurele in respect to a disclosure or to demonstrate their ability to successfully pick the Segal pickproof cylinder was met by objection of counsel for the Federal Trade Commission who in each such instance was sustained by the Trial Examiner for the reason that a trade secret as to picking might be disclosed.

Coming now to the Government's last witness, Courtney. He also said that he successfully picked the Segal "pickproof" cylinder on direct examination but, like Rusch and Leurele on cross-examination refused to test or demonstrate his ability in the presence of petitioners (R. 432, fol. 1296). Further pressed to make a public demonstration (R. 434, fol. 1300), Courtney again refused to make the test.

Petitioners appealed to the Federal Trade Commission from the rulings of the Trial Examiner denying petitioners the right of fully cross-examining Rusch and Leuerele, and the Commission in its order of October 12, 1940 (R. 42-44) held that the tests by the Commission's witnesses shall be secret or in other words the tests on the Segal pickproof cylinder shall

> " * * * be picked in the presence of the Trial Examiner *alone*." (R. 44, fol. 130.)

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*R. 247, fol. 740; R. 251, fol. 753; R. 258, fol. 774; R. 295, fols. 883-885; R. 351, fol. 1051; R. 355, fol. 1065.

and that

> "* * * the production of the picking instruments of Rusch and Leurele and the performance of such demonstration would require the revelation of trade secrets." (R. 43, fol. 128.)

Following the Commission's ruling to hold the hearing in camera, such secret hearing was held wherein all the petitioners were excluded. Apparently both Rusch and Leurele attempted to pick the Segal "Pickproof" cylinders. The Trial Examiner in his findings stated that Leurele failed and that Rusch successfully picked the Segal "Pickproof" cylinders, one in thirty minutes, and another in four minutes. These findings were made by the Trial Examiner despite his earlier admission to the effect "I am not an expert in this line at all" (R. 286, fol. 857, third paragraph).

The secret hearing although held by the Federal Trade Commission was vigorously objected to by the petitioners on the ground that no trade secret was involved and on the further ground that such secret hearing arbitrarily and unfairly restricted petitioners' right to a fair cross-examination on the sole and dominant issue of the case.

The Commission also accepted the broad definition of "picking" by Rusch, Leurele and Courtney and in its findings ruled that

> "picking may be defined as the opening of a lock without the use of the original or duplicate keys and without damage to the lock." (R. 68, Paragraph Seven.)

The petitioners' witnesses, that is those that qualified as experts in the art of picking locks specified that the art of picking locks is common knowledge in the trade and involves *no trade secret at all.* Petitioners contend that to satisfy the definition of picking——

picking means must be employed to be within the plain meaning of the expression, "pickproof"—not *any* means to open a lock, as broadly laid down by the Commission.

Petitioners' experts further testified that each tested and tried to pick to the Segal "pickproof cylinder" many and many times and they found it to be *pickproof* and that it could *not* be successfully picked.

Statute Involved.

The statute involved is Section 5 (a) of the Federal Trade Commission Act, 52 Stat. 111; 15 U.S.C.A., Sec. 45. Its text in the appendix, *infra,* page 24.

Questions Presented.

1. Whether the hearing was so unfairly conducted by the Federal Trade Commission as to deprive the petitioners herein of the benefits of the Fifth Amendment of the Constitution.

2. Whether the petitioners' right of cross-examination has been prejudicially curtailed, and abridged and thus were denied a fair and impartial trial in accordance with established rules of procedure as guaranteed by our Constitution, the laws, and the decisions of our Courts.

3. Whether the Federal Trade Commission exceeded its constitutional authority by acting unjustly and arbitrarily and in an absolutely unreasonable manner by fixing its findings without substantial evidence to support its conclusions.

4. Whether the Federal Trade Commission disregarded the rules of evidence, and capriciously made findings by administrative fiat.

5. Whether the Federal Commission's findings that the petitioners' lock cylinder is not pickproof, are supported by substantial evidence, in view of the *systematic denial* by the Commission of the petitioners' right to cross-examine Rusch and Leurele, the Commission's witnesses, for purposes of testing their accuracy, ability, veracity and credibility.

These questions bring up the collateral questions:

6. Whether the Federal Trade Commission acting in the interest of the public may under the guise of privilege shield its own witnesses in a secret star chamber hearing wherein the petitioners over their objections were *excluded from the ascertainment of the truth of the sole and material issue in the case,* and limit and restrict petitioners' inalienable right to a full cross-examination of the Commission's *shielded witnesses* on dominant facts necessary and material for the proper and fair determination of the sole question involved herein, namely, whether the Segal cylinder lock is, or is not pickproof.

7. Whether as a matter of law where the crux of the case on behalf of the Federal Trade Commission depends solely upon the revelation of a self-styled trade secret and characterizes the only material and relevant issue, such trade secret, if any, must be disclosed as a matter of public policy in the interest of the ascertainment of the truth if required on cross-examination, or the case falls for lack of proof or substantial evidence to support the charge of the bill of complaint.

Assignment of Errors.

The Circuit Court of Appeals erred:

1. In entering a decree affirming and enforcing the order of the Federal Trade Commission even though such decree is based on no substantial evidence.

2. In ruling that the trial before the Federal Trade Commission was fairly conducted.

3. In ruling that there was no serious limitation of the right of cross-examination depriving petitioners of a fair hearing.

4. In ruling that the secret demonstrations with respect to picking by the government's witnesses, Rusch and Leurele, before the Trial Examiner *alone*, to the exclusion of the petitioners was not unfair.

5. In accepting the Federal Trade Commission's arbitrary definition of picking which is contrary to the accepted and well recognized definition in the trade, and

6. In ruling that where the evidence is conflicting, the Commission's decision must be accepted as final.

Reasons for Granting the Writ.

First: The petitioners were deprived of the benefits of the provisions of the Fifth Amendment to the Constitution of the United States by the Federal Trade Commission in denying the petitioners a reasonable latitude in cross-examining the Commission's witnesses, Rusch and Leurele with respect to the only essential charge remaining in the bill of complant, namely, whether the Segal cylinder is pockproof, or is not pickproof.

SECOND: The Federal Trade Commission exceeded its constitutional authority in relying on a secret hearing for shielding its witnesses, Rusch and Leurele, and in systematically limiting the petitioners' right to cross-examine these witnesses.

THIRD: The case presents an important question of Federal Law which has not been decided and should be decided by this Court, that is, whether a United States Administrative Bureau, such as the Federal Trade Commission, acting in the interest of the public as a prosecutor may under the guise of privilege rely on a secret hearing in which the petitioners and the public are excluded with respect to the sole and major issue in the case, and because of such secret hearing rendered findings based on no substantial evidence resulting in confiscation of property of the petitioners without due process of law. The public importance of this question is obvious and its final determination is essential.

FOURTH: The opinion of the Circuit Court of Appeals relative to the right of the petitioners to cross-examine the Government's witnesses, Rusch and Leurele is in direct conflict with prior decisions of the United States Supreme Court and of prior decisions rendered by the United States Circuit Court of Appeals of other circuits.

FIFTH: The denial of reasonable latitude by the Federal Trade Commission in cross-examining a witness is a prejudicial and reversible error.

SIXTH: That each of the matters passed upon in the opinion of the Circuit Court of Appeals is an important question of general law and decided in a way untenable and in conflict with the weight of authority.

For reasons herein outlined petitioners pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, N. Y., November 1, 1944.

Respectfully submitted,

SEGAL LOCK & HARDWARE CO., INC.,

LOUIS SEGAL,
President and Treasurer.

NORWALK LOCK COMPANY,

LOUIS SEGAL,
President and Treasurer.

LOUIS SEGAL (L. S.)

CHARLES M. PALMER,
Counsel for Petitioners.

Affidavit.

State of New York, }
County of New York. } ss.:

Louis Segal, being first duly sworn, deposes and says, that he is personally one of the petitioners herein; that he is the president and treasurer of the Segal Lock & Hardware Co., Inc., also one of the petitioners herein; and that he is the president and treasurer of the Norwalk Lock Company, also one of the petitioners herein, for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to those matters herein stated to be alleged on information and belief, and that as to those matters he believes it to be true; and that this petition is made in good faith and not for purposes of delay.

Louis Segal (L. S.)

Subscribed and sworn to before me this 1st day of Nov., 1944.

Michael Kohen,
Notary Public.